IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL APPEAL NO.27 SB OF 2002

DATE OF DECISION: AUGUST 22, 2007

Wazira

.....Appellant

VERSUS

The State of Haryana

....Respondent

1. Whether Reporters of local papers may be allowed to see the judgement?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

PRESENT: Mr. Rahul Vats, Advocate for
Mr. Gorakh Nath, Advocate,
for the appellant.

Mr. S. K. Hooda, Sr.DAG, Haryana,
for the State.

****

RANJIT SINGH, J.

Appellant Wazira has filed this appeal to impugn his conviction for offence under Section 18 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "the Act") and the sentence of 10 years RI coupled with fine of Rs.1 lac awarded to him.

On 8.4.2000, Inspector Nar Singh alongwith some other police officials was present at Railway Crossing, Tohana Road, Narwana. He received a secret information that the appellant was indulging in sale of opium and in case raid was conducted, opium could be recovered in heavy quantity. Secret information was shared with the police officials and a raiding party formed, which reached the house of appellant, Wazir. He was found present and on interrogation, disclosed his identity. Inspector Nar Singh served him a notice,

apprising him of his right to be searched either in the presence of a Magistrate or a Gazetted Officer. When the appellant opted for being searched in the presence of a Gazetted Officer, message was sent to Sukhdev Singh, DSP, Narwana, who reached the place in a Government vehicle. The house of the appellant was searched by Inspector Nar Singh on direction of DSP Sukhdev Singh. An aluminum container kept in the iron box with southern wall of the house was recovered. On being checked, opium wrapped in polythene bag was found from the container. Opium, on weighment, was found to be 6 Kgs. Samples of 10 grams each were separated and both samples and the opium recovered were sealed with the seal bearing impression `BS' and `SS'. Seal after use by the DSP was retained by him whereas the seal bearing impression `BS' was handed over to SI Balbir Singh. Other formalities in regard to investigation were also completed. The appellant was arrested. The sample was produced before Sub Inspector Virender Singh, SHO. The parcels were deposited with the M.H.C.

On completion of investigation, challan was filed against the appellant, leading to framing of a charge against him under Section 18 of the Act. The case of the prosecution is supported by 8 witnesses. Report of Forensic Science Laboratory is also produced and on the basis of prosecution evidence, the appellant was convicted and sentenced as already noticed. The appellant has accordingly filed the present appeal.

I have heard the counsel for the parties.

Learned counsel appearing for the appellant has made many fold submissions. He would first contend that prosecution could

not prove the conscious possession of the appellant over the contraband. The evidence regarding conscious possession was also not put to the appellant. As per the counsel, the recovery was from the house, which was not in exclusive occupation of the appellant where number of persons were present. It is also pleaded that there was 9 days' delay in sending the sample, for which no explanation is forth-coming. Plea also is that no independent witness was joined, which will make the recovery doubtful. This, according to the counsel, is required to be appreciated in the background that number of houses were there adjoining the house of the appellant. The counsel would also submit that DSP had kept seal with him after use and did not deposit it with any independent witness. Submission also is that the presence of DSP at the scene and at the time of recovery is doubtful. Proceeding further, counsel would also urge that there is no evidence that the requisite forms were filled at the spot. Case property, as per the counsel, was not produced before the Magistrate and further secret information was not reduced into writing, which would reveal violation of Section 42(1) of the Act. Counsel has also made reference to number of judgments in support of his submissions.

The case of prosecution is supported by the evidence of Nar Singh (PW7). He was the Inspector responsible for conducting the raid, leading to recovery of opium. He has lend whole hearted support to the entire prosecution story. He was subjected to cross-examination in sufficient detail but stood his ground. During his cross-examination, he brought out that number of persons were called to join as independent witnesses but they refused. Their

names were recorded in the case diary. A fact of significance, which emerges from the evidence of this witness and his cross-examination, is that not even a single question was put to him about the ownership of the house or the investigation that he may have conducted in this regard. He is even not addressed a single question in regard to presence of other persons in the house, who could be its occupants. The case of prosecution would also receive support from the evidence of DSP Sukhdev Singh. He clearly deposed that on receipt of a wireless message from Nar Singh (PW7), he had reached the spot. He has given a clear evidence in regard to recovery of aluminum ***DOLI***, which was found lying in the iron box. The opium was recovered therefrom and was found wrapped in a polythene bag. He has also supported PW7 in regard to efforts made by him in joining independent witnesses. This witness again is not addressed any question in regard to occupants or owner of the house or the place from where the recovery was effected. Evidence of Balbir Singh SI (PW6) would also lend support to the case of prosecution. He was present with Inspector Nar Singh at the time when the police party was on patrolling duty and when it received secret information. He had also accompanied PW7 at the time of raid and recovery. PW-6 version fully corroborates to the entire case of the prosecution including the recovery of the contraband. PW6 has also confirmed the efforts made by PW7 in calling independent witnesses to witness the search and about their refusal. All these witnesses were cross-examined in detail but nothing substantial could be extracted from them. The prosecution also produced the link evidence, especially of those persons, who were accompanying

PW7, being a part of the patrolling party. In this background, the submission made by counsel for the petitioner that the prosecution did not establish the conscious possession of the appellant over the opium is not made out from the facts established. It is seen that the opium is recovered from a house, which is occupied by the appellant or is owned by him. When given a chance, he did not raise any dispute or question about his being owner or in possession of said house. In fact, the submission made by counsel for the appellant that no question in regard to conscious possession or in regard to the ownership of the house was not put to the appellant is not borne out from the material on record. In fact, the appellant was addressed a specific question by the Court, which is to the effect that he had opted for the search of **his house** in the presence of Gazetted Officer. The relevant portion of the question reads “you vide reply Ex.PF/1 opted the search of `**your house'** in the presence of some Gazetted Officer.” It is, thus, clear that the aspect of the house being that of the appellant was taken note of by the Court on the basis of evidence and was even put to the appellant for him to answer in an appropriate manner. If the appellant was to plead that he is not the owner or occupier of the house, he could have so pleaded in response to this question. Again, it was specifically put to the appellant that search of `**his house;** led to recovery of aluminum container lying in an iron box, which was recovered. The plea of the counsel for the appellant that the prosecution failed to prove conscious possession of the appellant over the contraband and that evidence was not put to him, as such can not be accepted. Recovery from a house, which is owned or possessed by the appellant, which

he does not dispute while cross-examining the witnesses and does not plead so when asked is enough to show that the contraband could be assumed to be in conscious possession of the appellant. Once this aspect of evidence is established on record through a cogent prosecution evidence, it (the prosecution) would be entitled to seek the benefit of provisions of Section 54 of the Act. By virtue of this Section, the prosecution is entitled to say that requisite presumption be made against the appellant in regard to possession also, until he is able to prove anything contrary to the same. In trials of cases under this Act, it may be presumed unless and until the contrary is proved that the accused has committed an offence under this Act in respect of any narcotic drugs or psychotropic substance or any opium, poppy etc., for the possession of which he fails to account for satisfactorily. Once the prosecution has succeeded in showing that the opium was recovered from possession of a particular house where the appellant was found present and in occupation thereof, it was for him to explain that this house did not belong to him or it was owned or occupied or possessed by somebody else or further that the contraband opium, which was recovered did not belong to him. His failure to account for the same would lead to a presumption being drawn against him by invoking the provisions of Section 54 of the Act. Observations made in the case of ***Kashmir Singh Vs. State of Punjab,*** 2006 (2) RCR (Criminal) 477 would not be of any help to the appellant. IN this case, it is observed that the presumption of conscious possession being a rebuttable presumption will not apply where an opportunity is not given to accused to rebut and explain the same by putting question under

Section 313 Cr.P.C. As already noticed, the appellant in this case was questioned in regard to recovery from his house and, thus, being in conscious possession but he did say nothing to rebut the presumption. I am, thus, not inclined to accept this plea raised on behalf of the appellant.

Similarly, there is nothing much in the plea of delay in sending the sample as raised by the appellant. The appellant is not justified in saying that there is no valid explanation offered by the prosecution while saying that the sample was sent on 17.4.2000 whereas recovery was made on 8.4.2000. PW3 gave a clear evidence in this regard and replied while under cross-examination that he could not sent the sample parcel to FSL, Madhuban, from 8.4.2000 to 17.4.2000 as the docket was to be issued from the office of DSP. He denied the suggestion of the defence that it was intentionally delayed. No more question was addressed to this witness in this regard. Since the explanation for sending the sample with a so called delay of 9 days has come on record, it can not be said that the delay is not explained. Otherwise, it could not be disputed that the sample was found intact when received at the FSL.

The aspect of non-joining of independent witnesses has already been referred to while making reference to the evidence of various prosecution witnesses. The record would show that sufficient efforts were made by PW7 to join independent witnesses but none agreed to associate himself with the search. Evidence in this regard is consistent and brought on record through the versions of PW6, PW7 and PW8. Merely non-joining of an independent witness in itself can not be of much avail to the appellant. Nothing has been urged by

the appellant to show as to why the police witnesses would falsely implicate him in this case. Bald assertion of false implication without showing anything further would not be enough to cast aspersion of the evidence of police witnesses. Nothing is urged in this regard. Mere non-joining of independent witnesses would not be enough to discard the entire prosecution story, which appears to be true in the core.

Counsel for the appellant has not been able to substantiate his plea that the presence of PW8 DSP Sukhdev Singh is doubtful. Reference is made to point out to some contradictions in regard to the number of rooms stated to be existing in the house to say that the presence of DSP is doubtful. This would not be enough to doubt the presence of DSP at the spot. A person present at the house is not expected to minutely observe the number of rooms in the house and to depose about the number of rooms in the houses.

Counsel for the appellant would also plead for violation of provisions of Section 42(1) of the Act. Submission is that the secret information received by PW7 was not reduced into writing and that information of it was not sent as required by Section 42(2) of the Act. A perusal of evidence of PW7 would show that on return of the ruqa carrier, he had written FIR number with date on all the documents. This would obviously show that the information was sent to the Police Station by him obviously he had reduced the information in writing. It can not, thus, be said that the secret information was not reduced into writing and no information in this regard was sent. The search in this case was ultimately conducted by or in the presence of a Gazetted Officer. Hon'ble Supreme Court in the case of ***M.Prabhulal***

Vs. Assistant Director, Directorate of Revenue Intelligence, 2004 (1) RCR (Criminal) 160, after detailed analysis of the provisions of Sections 41 and 42 of the Act has held that it is clear from the language of Sub-section (2) of Section 42 that it applies to officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by sub-section (2) of Section 41, where such Gazetted Officer himself makes an arrest or conducts search and seizure. It is further held that a Gazetted Officer has been differently dealt with and more trust has been reposed on him can also be seen from Section 50 of the Act, which gives a right to a person about to be searched to ask for being searched in presence of Gazetted Officer. In this case, it was accordingly held that since the Gazetted Officer himself conducted the search and seizure of the contraband, he was acting under Section 41 of the Act and, therefore, it was not necessary to comply with Section 42 of the Act. Similar is the position in the present case. Here also search and seizure can be termed by a Gazetted Officer or in the presence of a Gazetted Officer for the provisions of Sections 41 and 42 of the Act to have any effect to vitiate the search and seizure. Further support can be had from ***Ravinder Kumar Vs. State of Haryana,*** 2001 (3) RCR (Criminal) 808 in this regard. Stressing about the need to draw balance between stringent compliance of these provisions and to literal compliance to make its applicability impossible, the Hon'ble Supreme Court held as under:-

> "In construing any facts to find, whether prosecution has complied with the mandate of any provisions which is mandatory, one has to examine it with pragmatic

approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of litigation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such persons escapes from the clutches of law. The court, however, while construing such provisions strictly should not interpret it so literally so as to render its compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out."

The prosecution case can not be thrown only on the ground that there is some infirmity in complying with the provisions of Sections 41 and 42 of the Act, specially so when the search was conducted in the presence of a Gazetted Officer, which lead to recovery. Striking a balance, as observed above, it can be said that urgency was there to nab the delinquent before he escaped or before he could do away with the contraband.

The contention raised on behalf of the appellant on the basis of observation made in the case of ***Risala Vs. State of Haryana,*** 1996 (2) RCR 707 that officer conducted investigation if conducted search and seizure would not be of much avail as such observations were made at the time of considering the person for release on bail and it was specifically observed in this case that it is not possible to finally adjudicate the issue at the stage of deciding bail application.

There is, thus, no merit in the appeal and the same is accordingly dismissed.

August 22, 2007 **(RANJIT SINGH)**
khurmi **JUDGE**